SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 23.

HARRY H. SHOCK, SURVIVOR OF MARTIN SHOCK, DECEASED, INDIANA, PLAINTIFF IN ERROR,

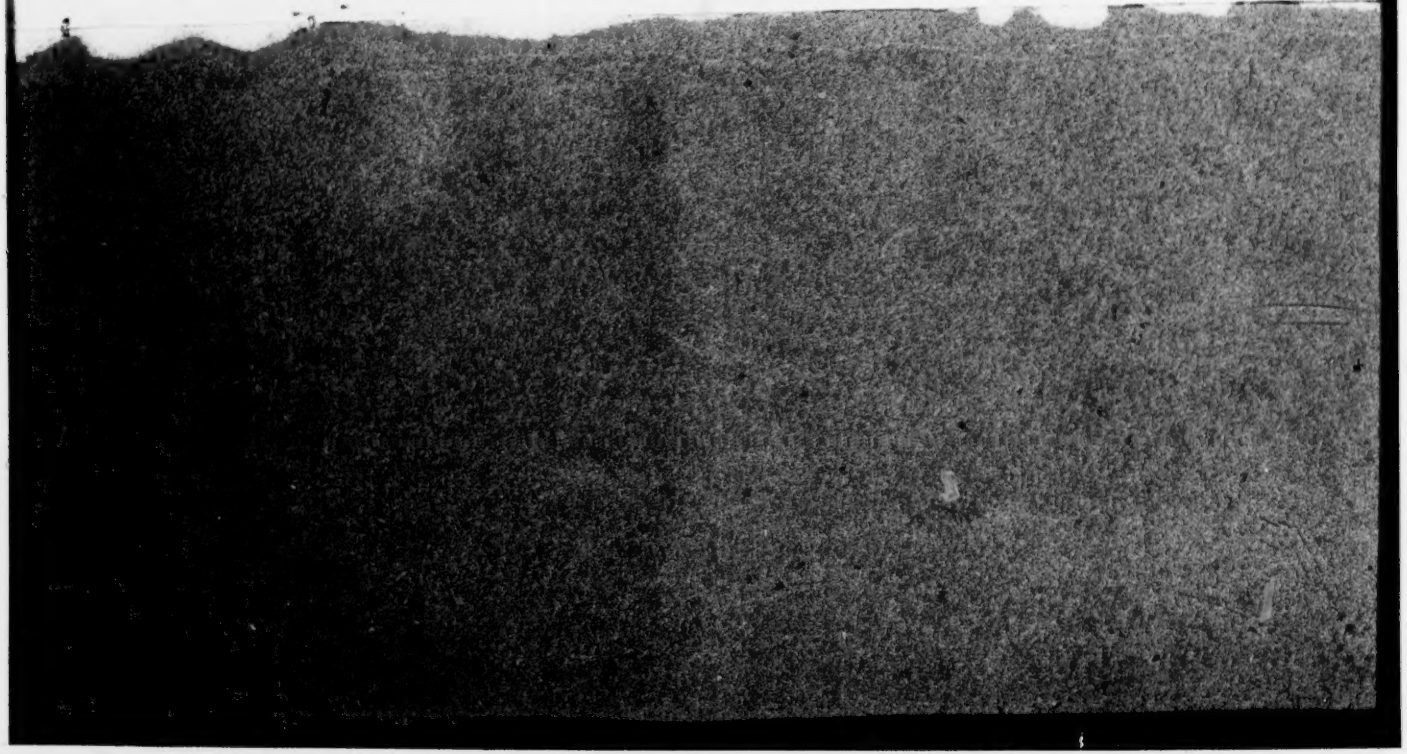
vs.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED JULY 6, 1904.

(18,609.)



(18,600.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 81.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 June 18/1902 Rec'd of def't $15.00 on pay't cost of transcript

GEO. B. ELLIOTT, *Cl'k.*

STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore, to-wit: on the 18th day of June, 1902, the same being the 21st judicial day of the May term, 1902, of said court, Harry B. Smith, auditor of Marion county, Indiana, by his attorneys, filed in the office of the clerk of the supreme court of the State of Indiana, a transcript of the record and proceedings in the Marion circuit court, of said State, in a cause wherein State of Indiana on the relation of Martha Lewis and Benjamin Lewis were plaintiffs, and said Harry B. Smith, auditor of Marion county, was defendant, together with an assignment of errors and joinder in error indorsed thereon; which transcript, assignment of errors and joinder in error together with an appeal bond, were filed in this court in term, and are in the words and figures following, to-wit:

2 Be it remembered, that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, etc., in the circuit court of the county of Marion in the State of Indiana, are the following in the cause of

STATE OF INDIANA on the Relation of MARTHA Lewis, Benjamin Lewis,
v.
HARRY B. SMITH, Auditor of Marion County. } Number 10986.

Be it also remembered. That heretofore, to-wit: on the 10th day of May, 1901, the above named relators filed in the office of the clerk of said circuit court their complaint against said defendant in the words and figures following, that is to say:

Complaint.

"STATE OF INDIANA, *County of Marion,* } *ss:*

STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis
v.
HARRY B. SMITH, Auditor of Marion County. } No. 10986. Circuit Court. Petition for Mandate and Prohibition.

The relators in the above entitled cause, by leave of the court first had and obtained, respectfully submit to the court their cause of

action for a writ of mandate and prohibition. And would
3 state as their cause of action that they are *bona fide* residents of the city of Indianapolis, Marion county, Indiana, and as such, on the first day of March, 1900, were the owners of certain real estate, to-wit: lot No. 611 in McCarty's 12" West Side addition to the city of Indianapolis, Indiana, on which the relators executed a certain mortgage to one Nicholas McCarty aggregating about $500.00 which is still due and unpaid; that a copy of said deed to said real estate is filed herewith and made a part of this complaint marked "Exhibit A."

That said Martha Lewis, one of said relators above mentioned, who having full authority to act for herself and her husband, did on the 30th day of April, 1900, claim her rights and immunities under the law of said State, for herself and said husband, by filing her affidavit as the law requires, with the auditor of said county above mentioned, setting forth that there was a mortgage due and unpaid, as above mentioned, and that the same was recorded in Record 323 page 395 in the recorder's office of Marion county, Indiana, a copy of which mortgage is filed herewith marked "Exhibit B."

That after filing said affidavit of exemption, as above mentioned, a copy of which is filed herewith and marked "Exhibit C," said relators demanded an allowance to be made to them by said auditor for the amount of said mortgage, that so much of their property be exempted from taxation and their property be released from said burden of taxation as in such cases made and provided.

That said auditor then and there refused to so allow the said relators any exemption whatever on their indebtedness as hereinbefore mentioned, and wholly disregarded their said affidavit, and charged said relators the full amount of taxes assessed against them, and informed them that it was necessary for them to both file
4 their affidavits showing the fact that the said indebtedness existed on account of said property, held by them, was an entirety.

Said relators then paid all taxes due, excepting so much as was and still is claimed as exempt from taxation, for the reasons hereinbefore stated, and exhibited to said auditor the deed for said property, and with it an additional affidavit alleging the material facts as recited in the affidavit filed by Martha Lewis his wife, and showing that she had full authority to act for both said relators, a copy of which is filed herewith, to-wit:

"To the auditor of Marion county, Ind.:

"I, the undersigned, *who* being duly sworn, upon oath, state that I am the husband of Martha Lewis who is the joint owner with me in lot No. 611 in McCarty's 12th West Side addition to the city of Indianapolis, Ind., and that she had full authority from me to execute a certain exemption affidavit as to the existence of a certain mortgage executed by us to Nicholas McCarty aggregating *to* about $500.00, which we claim is exempt from taxation as against our

property, that said mortgage is recorded in Book 323 page 395, in the recorder's office of Marion county, Indiana.

(Signed) BENJAMIN LEWIS."

Subscribed and sworn to before me this 7th day of May, 1901.

[SEAL.] W. B. SCHWARTZ,
Notary Public.

" My commission expires Oct. 26, 1901."

Which affidavit was also filed with said auditor of Marion county, Indiana, in addition to all the other facts hereinbefore set forth, and again demanded of said auditor to exempt from taxation so much of the property of the said relators as is represented by said
5 mortgage held by the said Nicholas McCarty and that the mortgage be assessed for taxation as the law directs; all of which said auditor then and there refused and still refuses to so allow said exemption as prayed for by the said relators.

Wherefore, the relators pray this court that an alternative writ of mandate may issue commanding said defendant Harry B. Smith, auditor of said Marion county, Indiana, to allow the exemption prayed for by said relators on the mortgage of $500.00 as set forth, and the same be deducted from the value of the real estate described in their deed, or so much thereof as the law directs in such cases made and provided.

BENJAMIN LEWIS."

Subscribed and sworn to before me this 9th day of May, 1901.

WM. B. SCHWARTZ,
Notary Public."

My commission expires October 26, 1901.

W. B. SCHWARTZ,
Att'y for Relators."

6 EXHIBIT A.

This indenture witnesseth, that we, Nicholas McCarty (unmarried), of Marion county, in the State of Indiana, Margaret R. McCarty Harrison and John C. S. Harrison, her husband, of Los Angeles county, in the State of California (formerly of Marion county, in the State of Indiana), Frances J. McCarty (unmarried), Henry Day (unmarried), Henry McCarty Day (unmarried), and Margaret McCarty Day (unmarried), of Marion county, in the State of Indiana, convey and warrant to Benjamin Lewis and Martha Lewis his wife, of Marion county, in the State of Indiana, for the sum of four hundred and fifty ($450.00) dollars, the following real estate, in Marion county, in the State of Indiana, to-wit: Lot numbered six hundred and eleven, (611) in McCarty's 12th West Side addition to the city of Indianapolis, according to the plat of said addition as recorded in the office of the recorder of the said county of Marion, in Plat Book No. 10, page 67.

In witness whereof, the said Nicholas McCarty has hereunto set

his hand and seal, this 21st day of January, 1897; and said Margaret R. McCarty Harrison and John C. S. Harrison, her husband, Frances J. McCarty, Henry Day, Henry McCarty Day and Margaret McCarty Day, by Nicholas McCarty, their attorney in fact, have hereunto set their hands and seals this 21st day of January, A. D. 1897.

NICHOLAS McCARTY, [SEAL.]
MARGARET R. McCARTY HARRISON, [SEAL.]
JOHN C. S. HARRISON, [SEAL.]
FRANCIS J. McCARTY, [SEAL.]
HENRY DAY, [SEAL.]
HENRY McCARTY DAY, [SEAL.]
MARGARET McCARTY DAY, [SEAL.]
By NICHOLAS McCARTY,
Their Attorney in Fact. [SEAL.]

STATE OF INDIANA, }
Marion County, } *ss:*

Before me, the undersigned, a notary public in and for said county, this 21st day of January 1897, Nicholas McCarty, acknowledged the execution of the annexed deed; and Margaret R. McCarty Harrison and John C. S. Harrison, her husband, Frances J. McCarty, Henry Day, Henry McCarty Day, and Margaret McCarty Day, by Nicholas McCarty, their attorney in fact, acknowledged the execution of the annexed deed.

Witness my hand and notarial seal, this 21st day of January, 1897.

WM. R. A. DELL, [SEAL.]
Notary Public.

7 EXHIBIT B.

This indenture witnesseth, that Benjamin Lewis and Martha Lewis his wife of Marion county, in the State of Indiana, mortgage and warrant to Nicholas McCarty, of Marion county, in the State of Indiana, the following real estate, in Marion county, in the State of Indiana, to-wit: lot numbered six hundred and eleven, (611) in McCarty's 12th West Side addition to the city of Indianapolis, according to the plat of said addition as recorded in the office of the recorder of the said county of Marion, in Plat Book No. 10, page 67, to secure the payment, when they shall severally become due, of eight (8) promissory notes of fifty ($50.) executed by the said mortgagors, one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), years after date respectively, negotiable and payable at the Indiana National Bank, of Indianapolis, Indiana, with interest at the rate of 8 per cent. per annum from date until maturity, payable annually, and with interest at the rate of eight per cent. per annum after maturity until paid, and five per cent. attorney's fees, value received, without any relief whatever from valuation or appraisement laws of the State of Indiana, said note- executed as aforesaid, for the unpaid

purchase money due upon said real estate, and the mortgageor- expressly agree to pay the sum of money above secured, without relief from valuation or appraisement laws, and upon failure to pay any of said notes at maturity, and the interest on all of said notes as the same shall become due, then all of said notes and the interest thereon shall be due and collectible, and this mortgage may be foreclosed accordingly.

In witness whereof, the mortgageors have hereunto set their hand- and seals, this 21st day of January, A. D. 1897.

BENJAMIN LEWIS. [SEAL.]
MARTHA LEWIS. [SEAL.]

STATE OF INDIANA, } ss:
Marion County, }

Before me the undersigned, a notary public in and for said county, this 21 day of January, 1897. Benjamin Lewis — Martha Lewis his wife acknowledged the execution of the annexed mortgage.

Witness my hand and notarial seal, this 21 day of January 1897.

WM. H. A. DELL, [SEAL.]
Notary Public.

[Endorsed:] Mortgage. Short form. Benjamin Lewis to Nicholas McCarty Received for record, this 12 day of Feb. A D. 1897, at 4 o'clock, p. m., and recorded in Record 323, page 395. —— —— recorder Marion county, Indiana.

8 EXHIBIT C.

Form No. 1526.

Affidavit of Mortgage Indebtedness.

STATE OF INDIANA, } ss:
Marion County, }

Martha Lewis being duly sworn, upon oath deposes and says that -he is the owner of the following-described real estate situated in Center township, Marion county, Indiana, to wit:

Lot number six hundred and eleven (611) in McCarty's West Side addition to the city of Indianapolis, according to the plat of said addition in Plat Book 10, page 67.

That there is an actual *bona fide* mortgage indebtedness of four hundred and fifty ($450.) dollars existing against said real estate, and that the same was unpaid on the first day of April, 190–; that the name of the mortgagee, to whom said mortgage was given, is Nicholas McCarty; that he resides in Indianapolis, Ind.; that said mortgage is recorded in Record No. 323, page 395, in the recorder's office of —— county, Indiana, and that the following is a description of the land on which said mortgage exists, viz: Lot No. 611 in McCarty's 12th West Side addition, in Plat Book No. 10 page 67 of the recorder's office of Marion Co. Ind. That this affidavit is made

for the purpose of having said mortgage indebtedness deducted from the assessed valuation of said mortgaged premises for the year 190–, as provided by an act of the General Assembly of the State of Indiana, entitled "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency."

MARTHA LEWIS.

Subscribed and sworn to before me, this 28 day of April 1900.

[SEAL.] WM. B. SCHWARTZ,
Notary Public.

My com. expires July 24, 1900.

NOTE.—Not exceeding $700 of mortgage indebtedness can be deducted. No deduction shall be allowed greater than one-half the assessed valuation of the real estate mortgaged.

[Endorsed:] No.—. Affidavit of mortgage indebtedness of Martha Lewis —— township, Marion county, Ind. Year 190–, $— Amount allowed, $— Filed Apr. 30 1900 —— ——, auditor —— county.

9 And afterwards, to-wit: on the 22nd day of May, 1901, being the 15th judicial day of the May term, 1901, of said Marion circuit court, before the Hon. Henry Clay Allen, sole judge thereof, the following proceedings were had herein, viz:

Order for Allowance of Writ.

"Come said relators and having heretofore filed their verified complaint in this cause, wherein they pray that an alternative writ of mandate issue out of this court, commanding the defendant to exempt certain property from taxation in the sum of $500.00, that sum is due and owing to one Nicholas McCarty on a certain mortgage on lot No. 611 in McCarty's 12th West Side addition to the city of Indianapolis, Indiana.

And the court having examined said complaint, and being advised in the premises, now orders that an alternative writ of mandate issue commanding the defendant to allow said exemption, as prayed for by said relators, or that he appear in this court on the 27th day of May, 1901, at 9 o'clock a. m. and show cause, if any he may have, why said exemption prayed for should not be allowed."

"Said alternative writ of mandate is in the words and figures following, viz:

10 *Alternative Writ.*

STATE OF INDIANA, } *ss:*
County of Marion, }

Marion Circuit Court.

STATE OF INDIANA on Relation of Martha Lewis, Benj. Lewis,
vs.
HARRY B. SMITH, Auditor of Marion County.

No. 10986. Alternat-e Writ of Mandate.

The State of Indiana to Harry B. Smith, auditor of Marion county:

Whereas Martha Lewis and Benjamin Lewis as relators in the above entitled cause have filed their sworn petition and therein allege, that they are *bona fide* residents of the city of Indianapolis, Marion county Indiana, and as such on the 1st day of March 1900, were the owners of certain real estate in said county and State, to-wit: Lot No. 611, in McCarty's 12th West Side add. to the city of Indianapolis, Ind.

That said relators executed a certain mortgagr aggregating about $500.00 *dollars*, to one Nicholas McCarty, of Indianapolis, Ind. which mortgage is still due and unpaid, that said relators on or about the 30th day of April 1900, claimed their rights and immunities under the laws of said State, as citizens thereof, by filing the affidavit of Martha Lewis, one of said relators, with the auditor of said county setting forth the fact that there was a mortgage on said lot as above mentioned and that the same was due and unpaid.

All of which facts as well as others were set forth in relator's petition above mentioned, and said relators demanded of said auditor to exempt so much of their property from taxation as should be found unpaid, as a matter of right under the law in such cases made and provided, and that the amount so found owing to the said Nicholas McCarty, on said mortgage be assessed to him, and that they be relieved from said burden of taxation, all of which the said auditor defendant, then and there refused, which refusal was arbitrary, without right and contrary to law on the part of said auditor, said above named defendant.

Now therefore, you the said Harry B. Smith, auditor of Marion Co. Indiana, *is* commanded to allow said exemption as prayed for by said relators upon the affidavit filed by the said Martha Lewis, and that said relators be relieved from the burden of taxation, or so much thereof as they are entitled to according to the valuation of said real estate, and that said amount so exempt from taxation be assessed against the said mortgagee Nicholas McCarty, and that the same shall be done without further excuse or delay, least in your default, complaint should come to me repeated.

Or upon your refusal to grant the prayer of said relators, as by them prayed for, and disobey this writ, you are commanded to ap-

pear before this court, on the 27 day of May, 1901, at 9 o'clock a. m. and show cause why the same should not be done, and have then and there this writ.

Witness my hand and seal of this court, this 23 day of May, 1901.

GEO. B. ELLIOTT,
Clerk Marion Circuit Court.

[SEAL.]

11 [Endorsed:] No. 10986. State of Indiana, *ex rel.* Marthe Lewis, *v.* Harry B. Smith, auditor. Alternative writ.

Sheriff's Fees.

Serv.	40
Mil.	20
Copy	25
D. & P.	20
	$1.05

W. B. Schwartz.

Return to Alternative Writ.

"Came to hand May 23, 1901, and served the within named Harry B. Smith, auditor of Marion county, Indiana, by delivering to him the original writ, of which this is a true copy, May 23, 1901.

EUGENE SAULCEY,
Sheriff of Marion County."

12 And afterwards, to-wit: on the 27th day of May, 1901, being the 19th judicial day of the May term aforesaid of this court, before the same hon. judge, the following proceeding was had herein:

"Come the parties by counsel and the defendant files a demurrer to the complaint herein in these words and figures, viz:

Demurrer of Def't.

"STATE OF INDIANA, } *ss:*
Marion County, }

STATE OF INDIANA *ex Rel.* MARTHA Lewis and Benjamin Lewis
v.
HARRY B. SMITH, Auditor Marion County.

No. 10986, Circuit Court. Demurrer of Defendant.

The defendant Harry B. Smith, auditor of Marion county, Indiana, demurs to the complaint and affidavit and alternative writ in this cause, and says that neither said complaint, affidavit nor writ states facts sufficient to constitute a cause of action against him, and

does not state facts sufficient to require this defendant to make further return thereto.

HAWKINS & SMITH,
Att'ys for Def't.

And afterwards, to-wit: on the 12th day of June, 1901, being the 9th judicial day of the June term, 1901, of said court before
13 the same hon. judge, the following proceedings were had herein:

Demurrer Sustained.

"Come the parties by counsel, and the court being sufficiently advised in the premises, does now sustain the demurrer to the complaint herein, to which ruling of the court the relators, at the time, except, and decline to plead further, but elect to stand on said complaint; and the court now renders judgment on the demurrer.

Judgment.

It is therefore considered and adjudged by the court that the relators take nothing by their suit herein, and that the defendant recover of the relators his costs herein taxed at $—."

And afterwards, to-wit: on the 1st day of March, 1902, there was filed in the office of the clerk of said Marion circuit court, a notice from the clerk of the supreme court of Indiana, of a reversal in this cause, as follows, viz:

Notice of Reversal in Supreme Court.

"THE STATE OF INDIANA:

In the Supreme Court, November Term, 1901.

Present: Hon. James H. Jordan, chief justice; Hon. John V. Hadley, Hon. John H. Gillett, Hon. Alexander Dowling, Hon. Leander J. Monks.

In the case of—

STATE *ex Rel.* MARTHA LEWIS ET AL. *v.* HARRY B. SMITH, Auditor, etc. } No. 19752. Appealed from the Marion Circuit Court (10986).

To the clerk of the circuit court of said county, Greeting:

You are hereby notified that the supreme court of said State has on this day reversed the judgment of the court below in the above entitled cause.
14 Sixty days from the date hereof will be allowed for the filing of a petition for a rehearing, unless otherwise ordered by the court.

"THE STATE OF INDIANA, *ss:*

I, Robert A. Brown, clerk of the supreme court of said State, certify that the above is a true statement of the decision of said court in the above entitled cause.

Witness my name and the seal of said court, this 28th day of February, 1902.

[SEAL.] R. A. BROWN,
Clerk Supreme Court.

Filed March 1, 1902.
GEO. B. ELLIOTT, *Clerk.*"

And afterwards, to wit: on the 24th day of May, 1902, being the 18th judicial day of the May term aforesaid of this court, before the same hon. judge, the following proceedings were had herein:

Redocketing of Cause; Demurrer Overruled.

"Come the parties and the court in accordance with the ruling of the supreme court of Indiana herein, now overrules the said demurrer to the application for an alternative writ of mandate herein, to which ruling of the court the defendant, at the time, excepts.

And now, by order of the court, the said opinion of the supreme court, on file in this cause, is ordered spread of record upon the order book of this court, and is as follows, viz:"

15 *Opinion of Supreme Court.*

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1902.

On the 28th day of February, 1902, being the 83rd judicial day of said November term, 1902.

Hon. James H. Jordan, chief justice; Hon. John V. Hadley, Hon. John H. Gillett, Hon. Alexander Dowling, Hon. Leander J. Monks, justices.

In the case of—

STATE *ex Rel.* MARTHA LEWIS ET AL. *vs.* HARRY B. SMITH, Auditor, etc. } No. 19752. Appeal from the Marion (10986) Circuit Court.

Came the parties by their attorneys, and the court being sufficiently advised in the premises gave the following opinion and judgment pronounced by Gillett, J.

Monks and Dowling, JJ., dissent.

Dissenting opinion by Dowling, J.

Petition for a rehearing overruled.

16 *Opinion.*

This is an action of mandamus, instituted by the appellant's relators against the appellee. The appellee filed a demurrer to the application and alternative writ, which was sustained by the court below. To this ruling the relators excepted, and refused to plead further, and from the final judgment against them that was subsequently rendered, they prosecute this appeal.

Counsel discuss but one question in this case, namely, the constitutionality of an act of the General Assembly of this State, entitled, "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency." Acts 1899, p. 422, §§ 8417*a et seq.*, Burns 1901; §§ 6272*a et seq.*, Horner 1901. The first three sections of the act are as follows:

SEC. 1. "Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate."

SEC. 2. "Any person desiring to avail himself, or herself, of the provisions of this act, shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situated a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which said incumbrance exists."

SEC. 3. "The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana, other than the one wherein such real estate is situate,
17 shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

The fourth section of the act prescribes a penalty for wilfully making a false statement under section two thereof. The fifth and last section declares the existence of an emergency for the immediate taking effect of the act.

Counsel for appellee claim that the act in question is unconstitutional, and they especially insist that it contravenes § 1 of article 10 of our State constitution. That section is as follows: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

We approach the consideration of this case with a deep sense of its importance, not only because constitutional questions are involved, but because we realize that this act, if upheld, will be a large factor in our revenue system.

The people, in their grant of power to the agencies of government, ordained that "the powers of government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial." Const. Ind., § 1, art. 3. These departments are co-ordinate. The constitution requires that any person elected or appointed to any office thereunder shall, before entering on the duties thereof, take an oath or affirmation to support such constitution. § 4, art. 15. The judiciary do not lay claim to a conscience that is quickened beyond that of any other official. The courts do not sit for the purpose of revising or obstructing legislative action, but to enforce the legislative will. Where, however, an enactment of the General Assembly falls within the domain of legislative power, or impinges on the limitations which the people, in their sovereign capacity, have hedged the grant of legislative power about, a court, that sits to apply the law as between litigants, refuses to enforce it, because the judge, acting on the responsibility of his oath, must enforce the will of the people, as declared in their primal social compact,
18 rather than the will of their agent in another department of the government. The task of declaring a legislative enactment unconstitutional is at once both solemn and delicate, and while the courts will not decline this responsibility, yet they approach such a duty in a spirit of profound caution and circumspection and with a disposition to enforce the legislative will, by resolving all ultimate reasonable doubts in its favor. It is with this disposition of mind that we approach this question.

The power of taxation is an incident of sovereignty, and is possessed by the Government without being expressly conferred by the people. State Board, etc. *v.* Holliday, 150 Ind. 216. The power belongs to that class of powers known as political powers, and while, in the genesis of popular government, it was occasionally exercised by the executive branch of the Government, yet it is now well settled that the power of taxation is purely a legislative function. State Board, etc. *v.* Holliday, *supra*; Union Tel. Co. *v.* Mayer, 28 O. St. 521. "The extent to which it, the taxing power, shall be exercised, the subjects on which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of

the legislature to which the States commit the exercise of power. The discretion is restrained only by the will of the people, expressed in the State constitution or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the Federal Government." Lane County *v.* Oregon, 7 Wall. 71, 77. And see also, Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 160. This doctrine is even more forcibly stated by Judge Cooley, in his work on taxation (p. 5). He there says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitations upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes. And not only is the power unlimited in its reach as to subjects, but in its nature it acknowledges no limits, and may be carried to any extent which the Government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy. If the power be threatened
19 with abuse, security must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority and violate no express provision of the constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity which will admit of no property or other conflicting right in the citizen while it remains unsatisfied."

Our State constitution does, however, contain some limitations on the legislative authority to tax. These limitations are found in the section of the constitution hereinbefore quoted, and in another section thereof, to which attention will hereafter be directed. Does the act in question violate the constitutional requirement of equality?

It is the theory of every republican government that taxes should be levied equally, but this is impossible, even in the simplest state of society, and the difficulty becomes more and more pronounced as our civilization becomes more complex, because the circumstances and pursuits of the people become more diversified. "A just and perfect system of taxation," says Chancellor Kent, "is yet a desideratum in civil government" (2 Com. 332). "Perfectly equal taxation," it has again been said, "will remain an unattainable good as long as laws and government and men are imperfect." Sharswood, J., in Grim *v.* School Dist., 57 Pa. St. 433, 437.

As a general rule, taxes due on property are not debts of the owner thereof. Thompson *v.* McCorkle, 136 Ind. 484. But it is, nevertheless, competent for the legislature to so provide. Snipe *v.* Shriner, 44 N. J. L. 206. If it can be fairly said that the equality limitation in the constitution was designed to prevent inequalities in the assessment of different tracts of real estate, considered as a

matter wholly apart from the interest of their owners therein, then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining unincumbered tract of real estate. We do not think, however, that the people of Indiana, in adopting the constitution of the State, had any such view. Taxes must be paid by persons—unless property is sacrificed therefor—and, moreover, the
20 whole idea of values is one of the artificialities of life. It therefore follows that when the people put the equality limitation upon the power to tax, they intended thereby to protect the owners of property. We must therefore regard the limitation that taxation must be equal as being satisfied when there is no discrimination as between taxpayers. Clearness is necessary here, however, and we therefore suggest, by way of emphasis, that our present statements relate only to the requirement of *equality* in taxation. Still dealing with this particular portion of the limitation, we next call attention to the fact that the selection of some objects for taxation and the omission of others, or even the selection of but a few objects for taxation, does not necessarily disturb the rule of equality, provided that the result of the imposition of the burden is to ultimately so diffuse itself among those who ought to bear their share of it as not to unreasonably lay it on particular classes of taxpayers, to the ease of the rest. "Let it reach all of a class," says Judge Cooley, "either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible." Cooley on Taxation, 169.

We may freely grant that with this act in force it will produce inequalities as between taxpayers in any given year, but we confidently affirm that it is beyond the ken of the most astute to say who will receive the most benefit from the act in the future. If one man gains an advantage over his neighbor this year, by means of this statute, it can not be said that the latter's property affairs may not hereafter be in such condition that he will not receive more of benefit from the statute than the former. As the act is presumed to represent a constitutional exercise of the legislative power it devolves upon those who would assail it as unequal or class legislation to point out what class of persons will hereafter be prejudiced thereby. Laws are rules of action, projected through and beyond the multifarious interests and affairs of mankind, and it is too much to affirm that they must at all times operate fairly, as applied to any individual, and particularly, as we have shown, is it too much to affirm that a tax law must always so operate.

21 If the power of taxation is a legislative function, and if it be true that in any system of taxation, however wisely framed,

disproportionate shares of the public burden will occasionally be thrown on some persons, it must needs follow that the courts must admit that there exists in the General Assembly a large measure of discretion in the enactment of a scheme of taxation. To borrow something from the language and thought of another court: It is the peculiar duty of a court to keep the first lines of the constitution clear, and not to stretch its power to correct legislative abuses. We do not mean to hold that statutory provisions relative to the levying of taxes might not so far on their face manifest, by invidious discriminations between persons and property, their unequal and unjust character as to call on the courts to refuse to enforce them, but as observed by Gibson, C. J., in Kirby *v.* Shaw, 19 Pa. St. 258, 261, "It is illogical to argue from an extreme case; or from the abuse of power to a negative of it. Every authority, however indispensible, may be abused; and if it might not it would be powerless for good."

As to the requirement of uniformity, we have to say that the act in question purports to be a law that is uniform throughout the State, and as it permits all persons to take advantage of it, when their circumstances bring them within its operation, we are of the opinion that it does not violate that requirement of the constitution. Cleveland etc. R. Co. *v.* Bachus, treas., 133 Ind. 513; Pittsburgh etc. R. Co. *v.* Bachus, treas., 133 Ind. 625; Gibson *v.* Board Com. etc., 128 Ind. 65.

It is our judgment that every limitation upon the power to tax that is found within the limits of § 1 of art. 10 of our constitution was intended, at least primarily, to protect the taxpayer, but it must be admitted that the latter part of the section, requiring the General Assembly to prescribe such regulations as shall secure a just valuation for taxation of all property that the constitution does not authorize to be exempted, looks to still further protecting the taxpayer in the matter of equality, by prescribing a duty upon the General Assembly to provide for the securing of a *just* valuation for taxation of *all* property, except as aforesaid. The decisions of this court have thoroughly committed it to the proposition that legislative enactments that purport to grant exemptions, not falling within the class of exemptions mentioned in the constitution, are void. State
22 *ex rel.* Morgan *v.* Workingmen's etc. Ass'n, 152 Ind. 278; Harn *v.* Woodard, treas., 151 Ind. 132; Deniston, aud. *v.* Terry, 141 Ind. 677; Warner *v.* Curran, 75 Ind. 309; State *ex rel.* Tieman *v.* City of Indianapolis, 69 Ind. 375.

The enactment in question cannot be supported as an exemption law. It is to be remembered, however, that the regulations that the General Assembly are required to enact must look to the securing of a *just* assessment as well as to the assessment of *all* property that the constitution subjects to taxation. We cannot subordinate the one requirement to the other. Indeed, it is a rule of construction that a constitution is an instrument of such high and solemn import that every word thereof is to be regarded as though it was hammered into place. The question therefore arises whether it is com-

petent for the General Assembly to enact a law that provides for the taxation of real estate according to the actual interest of the owner therein, or that, at least, partially effectuates that object, under that provision of the constitution that requires that the regulation shall be just?

Many cases uphold the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interests of the mortgagor and mor gagee respectively therein. Savings and Loan Society *v.* Multnomah County, 169 U. S. 421, and cases there cited. This amounts, in effect, to taxing a mortgage at the *situs* of the land, and such a statute has been held valid even as against non-resident mortgagees. Savings etc. Society *v.* Multnomah County, *supra*. The enactment in question, although it does not operate to transfer the *situs* of the debt, amounts to an apportionment of the land value for taxation, as between the mortgagor and the mortgagee, except when the mortgage is held by a non-resident or is payable to some public and non-taxable fund. May the General Assembly enact such legislation, in its endeavor to be just? We do not mean to intimate that no law can be upheld that in its operation may result in duplicate taxation. As stated by Judge Cooley, in his work on Taxation (page 223): "We make out, therefore, no conclusive case against a tax, when we show that it reaches twice the same property for the same purpose. This may have been intended, and in many cases, at least, is admissible." But if A sells a tract of land to B for $1,000, and takes a mortgage back for the entire purchase money, and if the mortgagee be a resident of this State, there is brought into existence, in the absence of the
23 enactment in question, additional taxable property to the amount of $1,000, although it is apparent that by such transaction the State's wealth has not been increased a farthing. To what extent the State's assessment sheet is augmented by duplicate taxation, courts, that act on evidence, cannot ascertain; a public tribunal could not enter on an inquiry, unless, like a legislature, it was authorized to act on common repute and opinion.

We are disposed to place stress upon the fact that the lien which may be made the basis of a deduction is a mortgage lien, as distinguished from other liens upon real estate, general and special. While it is true that for most purposes a mortgage will be treated as a mere security for a debt, yet whenever it is necessary to render effective the rights of the parties, the courts will treat mortgages as forms of defeasible sales. Vinnedge *v.* Shaffer, 35 Ind. 341; United States etc. Co. *v.* Harris, 142 Ind. 226; Citizens' State Bk. *v.* Harris, 149 Ind. 208; Savings Society *v.* Multnomah County, *supra*. As observed by the Supreme Court of the United States, in the case last cited: "If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation."

In our opinion the General Assembly may enact a statute like the one in question, without violating the provision that it shall prescribe such regulations as shall secure a just valuation for taxation

of all property except such property as the constitution authorizes to be exempted. Gross valuations are not required. As said by this court in Florer, treas. *v.* Sheridan, adm., 137 Ind. 28, 41: "Section 1 art. 10, *supra*, does not say the *gross* (our italics) amount of all notes, accounts, and other choses in action shall be taxed, and we cannot so construe it without perverting its language and obvious meaning." In our opinion the case last cited is entirely in point, for as it is well settled that, under a constitutional provision requiring *all* property to be taxed, it is not competent to exempt solvent credits, yet this court there held that the legislative authority was sufficient to warrant the deduction of *bona fide* indebtedness from the total amount of the notes, accounts and other choses in action embraced within the taxpayer's schedule. We, therefore, perceive no difference in principle between this case and the Florer case. As the court there said: "Deductions and exemptions are two separate and distinct things, having no connection. A deduction
24 is the taking of the subtrahend from the minuend. It is a subtraction. Exemption is an immunity or privilege—it is freedom from a charge or burden to which others are subjected." Upon the subject of an allowance for debts, Judge Cooley says: "Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. Sometimes the deductions are from credits only; sometimes from mortgages, sometimes from the aggregate of personal estate. * * * The allowance is not in any proper sense an exemption, but is made by way of reaching the just amount of taxable property." Cooley on Taxation, 174. This general doctrine is also recognized by Mr. Desty. 1 Desty on Taxation, 551.

The enactment in question, while it does not go as far as it might possibly do in the direction of subjecting mortgages to taxation, does not, it is to be observed, relieve any mortgage credit from taxation that was taxable before, and the mere fact that there may have been an omission to extend the power of taxing mortgages will not invalidate the provision for a deduction from mortgaged lands, any more than the adjudged omission to provide for the taxation of paid up life insurance policies will avoid the entire legislative scheme of taxation.

We have now reached the question whether the act violates § 22 of art. 4 of the State constitution. That section provides that "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the assessment and collection of taxes for State, county, township or road purposes." It cannot be claimed that the act is local, but the question whether it is special challenges our consideration. This court, in Indianapolis St. R. Co. *v.* Robinson, — Ind. —, 61 N. E. 197, 198, quoted the following statements, found in the case of State *v.* Parsons, 40 N. J. L., 1: "Interdicted special laws are those that rest upon a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related. They create preferences and establish inequalities. They apply to per-

sons, things or places, possessed of certain qualities or situations, and exclude from their effect other persons, things, or places which are not dissimilar in these respects." Granting, but not deciding, that § 1 of art. 10 of our constitution and § 22 of art. 4 of that instrument overlap, in the effort to put checks upon the otherwise supreme and peremptory power of taxation, we feel that this opinion has already vindicated the act from the claim that it is discriminative as between taxpayers.

The first words in the body of the act are: "*Any* person desiring to avail himself, herself, of the provisions of this act, shall," etc. The words import universality, they are broad enough to include all persons. In Gibson *v.* Board Com. etc., *supra*, we find the following: "It is held that a statute which is of general and uniform operation throughout the State, and operates alike upon all persons, under the same circumstances, is not subject to the objection that it is special or local legislation. State, *ex rel.*, *v.* Reitz, 62 Ind. 159; McLaughlin *v.* Citizens etc. Ass'n, 62 Ind. 264; Heanley *v.* State, 74 Ind. 99; Elder *v.* State, 96 Ind. 162." Again, it was said by Frazer, J., in Hingle *v.* State, 24 Ind. 28, 31: "What is a special act? It is such as at common law the courts would not notice, unless it were pleaded and proved like any other fact." Mr. Sutherland, in his work on Statutory Construction, collects a large number of cases relative to prohibited special legislation, and his text enumerates opinions in accord with those expressed in State *v.* Parsons, *supra*. This act does not, however, amount to a special law, if we accept the view of that learned author as to what constitutes special legislation, for he says (§ 129): "The prohibition is in the way of legislation for individual cases. It is equally fatal to such legislation though it be general in form. If a statute is plainly intended for a particular case and looks to no broader application in the future, it is special or local, and, if such laws are prohibited on the subject to which it relates, is unconstitutional. The lineaments by which such cases are to be distinguished are usually so special that a law confined thereto would be anticipated to have no effect from the antecedent improbability of such a case arising. When, therefore, it is found to fit such a special case, it is deemed to have been enacted solely for it." Even if we were inclined to commit this court to the doctrine of State *v.* Parsons, *supra*, we should nevertheless be compelled to hold that the act we have been considering does not thereby stand condemned.

It has been suggested that this act is invalid by reason of the provision of the fourteenth amendment to the Federal Constitution, relative to the right to the equal protection of the laws, but as a discussion of this subject upon our part would require a reiteration, to some extent, of what has been heretofore said, we are not inclined to give further expression of our views upon this subject. As particularly applicable, however, to this question, as well as to some of the other questions that we have heretofore discussed, we quote the following statements from the Supreme Court of the United States, in the case of Magoun *v.* Ill. Trust and Saving Bank, 170 U. S. 283,

292: "Is the act open to this criticism? The clause of the fourteenth amendment especially evoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky R'd Tax Cases, 115 U. S. 321. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes *v.* Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness, of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County *v.* Kimball, 102 U. S. 704, that this court is not a harbor in which can be found a refuge from ill-advised, unequal, and oppressive State legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of State
27 laws is not necessarily an objection to their constitutional validity.' Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said, in The Bell's Gal R'd Co. *v.* Pennsylvania, *supra*, and Mr. Chief Justice Fuller in Giozza *v.* Tiernam, 148 U. S. 657, 'that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation.' The range of the State's power was expressed by Mr. Justice Bradley, as follows: 'It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; *it may allow deductions for indebtedness, or not allow them* (our italics). All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their constitution.' And so Mr. Justice Miller, speaking for the court in Davidson *v.* New Orleans, 96 U. S. 97, said: 'The Federal Constitution imposes no restraints on the State in regard to unequal taxation.' The court, through Mr. Justice Lamar, in Pacific Express Co. *v.* Seibert, 142

U. S. 339, was equally emphatic. He said on page 351: 'This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens.' And it was said in Merchants' & Mfrs. Nat. Bank *v.* Pennsylvania, constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision on Bell's Gap R'*f* Co. *v.* Pennsylvania." See also as bearing on the question as to the application of the fourteenth amendment, Cass
28 Farm Co. *v.* City of Detroit, 181 U. S. 396; City of Detroit *v.* Parker, 181 U. S. 399; Cleveland, etc. R'y Co. *v.* Bachus, treas., *supra*; Pittsburg, etc. R'y Co. *v.* Bachus, treas., *supra*.

It may be a matter of grave doubt whether public policy is conserved by an enactment that substitutes net values for gross values, upon a species of property upon which the State must largely depend for its maintenance, but we cannot run a race of opinion with the legislature upon this subject.

Counsel for appellee dwell at some length upon some of the crudities of the act in question. We do not deem it necessary to consider such matters. What we affirm is that the act is valid. It follows, therefore, that the court below erred in sustaining appellee's demurrer to the application and alternative writ.

Judgment reversed with instructions to the court below to overrule the demurrer to the application and alternative writ, and for further proceedings not inconsistent with this opinion.

Dowling and Monks, JJ. dissent.

29 *Dissenting Opinion.*

Dissenting opinion—DOWLING, *J.*:

After careful and impartial reflection, I am constrained to withhold my assent from the reasoning and conclusions of the opinion adopted by the majority of the court. The importance of the question presented upon this appeal renders it proper to state, with some particularity, the grounds of such dissent.

In determining the case, the court is required to interpret certain provisions of the State constitution. Those provisions relate to the highest function of government—the power of taxation. Vital to the Commonwealth, its abuse or misdirection is disasterous to the citizen. The subject occupies a conspicuous place in the organic law of the State, and the language employed concerning it is clear, forcible, and, as it seems to me, unmistakable in its meaning.

The question for decision is the constitutional validity of an act of the legislature entitled "An act concerning the taxation of real

estate encumbered by mortgage, and declaring an emergency," which took effect, if valid, March 4, 1899. Acts 1899 p. 422, §§ 8417, 8418, 8419, *et seq.*, Burns 1901.

That portion of the act necessary to be considered is contained in the first three sections, and reads as follows:

"SECTION 1. Be it enacted, etc., That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage- premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. *Provided*, That no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

"SEC. 2. Any person desiring to avail himself or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such encumbrance exists.

"SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana, other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

These sections, as I believe, are plainly and directly in conflict with three separate provisions of the State constitution, namely:

First. Sec. 23, art. 1, of the bill of rights: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Second. Sec. 22, art. 4: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the assessment and collection of taxes for State, county, township, or road purposes."

Third. Sec. 1, art. 10: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal, except such only for

municipal, educational, literary, scientific, religious and charitable purposes, as may be especially exempted by law."

The act in question is subject to the following objections: (1), it violates the rule of the constitution requiring uniformity and equality in the rate of assessment and taxation; (2), the act is a special law for the assessment of taxes for State, county, township and road purposes; (3), it grants to one class of citizens privileges and immunities which, upon the same terms, will not equally belong to all citizens; and (4), it exempts from taxation real estate not held for municipal, educational, literary, scientific, religious or charitable purposes. If it shall be found upon examination that any
31 one or more of these propositions is true, then the statute must be held invalid.

All of the constitutional provisions referred to have been in force since November 1, 1851. Carefully prepared and comprehensive statutes, regulating the assessment and collection of taxes, have been adopted by the General Assembly from time to time, but from the taking effect of the State constitution until March 4, 1899, a period of nearly half a century, no statute exempted from assessment for taxation any real estate on the ground that it was encumbered by a lien of a mortgage. This circumstance is not conclusive, but as evidence of a practical interpretation of the constitution by the legislature, the failure for so great a length of time to recognize mortgage liens or lands as proper deductions from the value of the lands for the purposes of taxation, is entitled to some consideration. It is to be observed, too, that this practical interpretation of the constitution, as prohibiting such deductions, is perfectly consistent with the language of that instrument, and is reasonable and natural. Stuart *v.* Laird, 1 Cranch 299; Martin *v.* Hunters' Lessee, 1 Wheat. 304, 351; Cohens *v.* Virginia, 6 Wheat. 264, 418; Bank of U. S. *v.* Halstead, 10 Wheat. 51, 63; Ogden *v.* Saunders, 12 Wheat. 290; Minor *v.* Happersett, 21 Wal. 162; Bay City *v.* State Treas., 23 Mich. 499; McCulloch *v.* Maryland, 4 Wheat. 316; Cooley *v.* Wardens of Port of Phila., 13 How. 299; The Gennessee Chief, 12 How. 443; Rodgers *v.* Goodwin, 2 Mass. 475; Brigham *v.* Miller, 17 Ohio 446; Board *v.* Bunting, 111 Ind. 143.

Again, an examination of the act of March 4, 1899, discloses that it did not receive the approval of the governor, but became a law without his signature. While the failure of the executive to approve a bill does not affect its validity, if it becomes a law without his approval, the fact remains that one of the great departments of the State government has withheld its recognition of the statute. The non-approval of the act by the governor is, at least, suggestive of doubt in the mind of the executive *in* the validity of the law.

It is also to be noted that the act under consideration is not a part of a general statute embracing a complete system for the assessment and collection of taxes, but is sporadic in its character, and stands separate and apart from all other legislation upon the subject of taxation. Such being its nature, the inference is not
32 strained that it probably did not receive the attention which would have been accorded to it if it had constituted a por-

tion of a general statute regulating the assessment and collection of taxes.

But passing from these minor objections to those arising from the Constitution, it will be found that, if the statute is to stand, the Constitution must give way. In other words, to sustain the act the court must, in the language of Judge Story, "abrogate the text, fritter away its obvious sense, and narrow down its true limitations."

The first clause of §1, article 10 of the constitution declares that, "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation." By this clause, the principle which must govern all legislation on the subject of the assessment and collection of taxes is announced. At the very basis of every valid statute of this kind lies the condition that the rate of assessment and taxation must be uniform and equal throughout the district or locality in which the tax is levied. An assessment is defined to be a valuation made by authorized persons according to their discretion, as opposed to a sum certain or determined by law. It is a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man shall pay. Under our constitution the rule or ratio of valuation of real estate of those who are to pay the tax must be uniform and equal throughout the State, and the ratio of taxation must be uniform and equal throughout the district or locality affected.

This is the first and paramount requirement.

The second clause of §1, article 10, is evidently subsidiary to the first. It relates to the means by which a uniform and equal assessment is to be obtained. The General Assembly is to "provide such regulations as shall secure a just valuation for taxation of all property real and personal." The obvious meaning of this provision is that competent persons shall be appointed or elected as assessors to determine the valuation to be put upon property for the purpose of taxation, and that the general mode of procedure shall be fixed by law, but none of the regulations so prescribed can change the rule of uniformity and equality of valuation immovably established by the first clause of the section. The danger and abuse against which the constitution was intended to guard was an arbitrary
33 valuation of property by the State. Instead of an arbitrary and perhaps unreasonable assessment by the law itself, a *just* valuation was to be secured. In this connection, the term *just* is the equivalent of correct, honest, true. Its use requires the valuation of all property of the same kind in the same taxing district by a uniform and equal standard. By no rule of constitutional interpretation can the term "just," as used in the second clause of §1 be said to qualify or limit, or restrict the meaning of the words "uniform and equal" used in the first.

Under the act before the court, a lot or tract of land may be assessed for taxation at the rate of $1,400; while another lot or tract, in the same taxing district and of the same value, may be assessed for taxation at the rate of $700. The pretext for this violation of the rule of uniformity and equality of assessment, is that the second

lot is subject to the lien of a mortgage to the amount of $700 or more, while the first is unencumbered. The fallacy of this method becomes apparent when it is remembered that general taxes are assessed against property, and not against its owners. The tax follows the thing against which it is assessed, and does not constitute a debt against the owner. Its claim for revenue being paramount, the State has nothing to do with questions of title, liens or equities. Before the law, all property stands alike subject to taxation without regard to the title by which it is held, or the equities with which it is charged. A valid sale for delinquent taxes fuses all rights of ownership, extinguishes all equities, and transfers to the purchaser an unencumbered title in fee simple.

The entire legal title being in the owner of the lot or tract, and the value of the land for taxation being unaffected by the amount of liens upon it, the attempted regulation by which the valuation of the land is made to depend upon the accident of the existence of a mortgage lien, destroys the uniformity and equality of assessment required by the Constitution, and therefore cannot be upheld. The general doctrine upon this subject is clearly stated by Judge Cooley: "It is of the very essence of taxation that it be levied with equality and uniformity, and to this end there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it." Cooley's Const. Lim. (6th ed.) 608; 2 Kent 231; Bright *v.* McCulloch, 27 Ind., 223.

34 It is said in Cleveland etc. R. Co. *v.* Backus, 133 Ind. 513, 535: "The first clause of the section (§ 1 article 10, *supra*) is certainly complied with when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation; that is to say, there is uniformity and equality of assessment and taxation when all the property is to be assessed at its true cash value, and the same rate is fixed on all property subject to assessment for the tax."

And in Willis *v.* Crowder, 134 Ind. 515, the court say: "The taxable value of property is its fair cash value, a fair cash value being the market or selling price, and if there be no market value, then it is the actual value that rules."

The act of March 4, 1899, does not permit an assessment of the mortgaged real estate at its fair cash value, or at any value fixed by the judgment or discretion of the assessors, but it requires that arbitrary deductions shall be made of amounts fixed by the legislature, and which have no basis in, or connection with, the nature of the property assessed, or even with the encumbrances to which it is subject. Under this act, none of the property to which it relates can be assessed at its cash value, as other real estate is assessed.

The act does not attempt to divide the assessment for taxation between the mortgagor and the mortgagee, but stops short with the deduction allowed to the mortgagor or owner of the fee. It entirely relieves the mortgage interest from taxation if the mortgagee is a non-resident, or if the mortgage is a school fund mortgage.

But it is claimed that absolute uniformity and equality of assess-

ment can not be attained, and therefore the law must be satisfied with something less. The answer to this proposition is that the obstacles to uniformity and equality contemplated by the courts which have used this language are those which inhere in the nature of things, such as the fallibility of men's judgment as to values, the mistakes and omissions of public officers, and the frauds of owners. They are never such inequalities and differences as are created by the law itself. While the efforts of the law to produce absolute uniformity and equality may be ineffectual, the constitution demands that the taxing statutes shall aim at these objects, and that such statutes themselves shall be free from provis-
35 ions which destroy them.

2. The act of March 4, 1899, is a special law for the assessment and collection of taxes for State, county, township and road purposes, and therefore falls within the prohibition of § 22, article 4 of the constitution. The very title of the act indicates its special character. It is not general either as to the property exempted from assessment and taxation, or the persons who are the objects of its discriminating bounty. It is entitled, "An act concerning the taxation of real estate encumbered by mortgage." * * * It does not apply to real estate encumbered by liens, generally, but, without reason therefor, is confined, exclusively, to such real estate as is encumbered by a particular kind of lien. In this respect, it favors certain individuals and property, and discriminates against all others of the same class who are similarly situated. It cannot be defended on the ground that there are two separate estates in lands encumbered by mortgage, and that this fact constitutes a basis of classification. The law declares that for the purpose of taxation, the mortgagor shall be deemed the owner of real property until foreclosure and possession taken by the mortgagee. "In cases of mortgaged real estate, the mortgagor shall, for the purpose of taxation, be deemed the owner until the mortgagee shall have taken possession of the mortgaged premises, after which the mortgagee shall be deemed the owner." § 28 p. — Acts 1891, § 8438 Burns 1901.

It has been held repeatedly by this court that a mortgage conveys no estate in the lands mortgaged, but simply creates a lien. § 1099 Burns 1901; Reasoner *v.* Edmunson, 5 Ind. 393; Francis *v.* Porter, 7 Ind. 213; Norton *v.* Noble, 22 Ind. 160; Grable *v.* McCulloh, 27 Ind. 472; Fletcher *v.* Holmes, 32 Ind. 497.

This being so, what difference is there between the lien of a mortgage on lands and other liens? And why should real estate subject to one particular kind of lien be separated from other property also subject to liens of equal dignity, and relieved from equal burdens of taxation? The class to which the owner of the favored real estate belong is that of debtors and owners of real estate subject to liens. The class to which the property belongs is that of real estate encumbered by liens. Why should these classes be subdivided, and one subdivision favored, and the remaining members of those classes discriminated against? To

illustrate the practical operation of the statute, let it be
36 supposed that A, B, C, D, and E each, is the owner of a lot of the value of $1,400 on the same street, in the same block, in the same town. A's lot is subject to a mortgage lien of $700; B's to a vendor's lien of $700; C's to a mechanic's lien of $700; D's to a street improvement lien of $700; and E's to the lien of a judgment for $700. Can any reason, valid in law, be given why A should have the right to a deduction of $700 from the value of his lot, as the basis of assessment and taxation, but that B, C, D and E shall be denied that privilege? Why "the amount of such valuation, remaining after such reduction shall have been made, shall form the basis for assessment and taxation for said real estate," in A's case, but that the full amount of the valuation of the lots owned by B, C, D and E, without any deduction for the liens upon them, should form the basis of such assessment against them, it is impossible to discover.

But even as among the favored owners of real estate encumbered by mortgage liens, the classification is unequal and unjust. If A owns a lot valued for taxation at $1,400, encumbered by a mortgage lien of $700, he is allowed a deduction of $700. But if B owns a lot valued at $500 encumbered by a mortgage lien of $700, he is allowed a deduction of $250 only. Upon what natural or reasonable basis do these discriminations rest? Is not the statute "discriminative between individuals of the," so called, "class, and does it not select some for an exceptional burden?" Suppose, however, the reasons urged in support of the statute in question are valid; that as it applies to all persons belonging to a class into which all property owners of the State may at some time enter; and as it is not, in terms, limited to individuals of a class, it is therefore not in conflict with the constitution. All enactments having these qualifications, it is said, are to be regarded as within the limitations of the constitution. The owners of all real estate encumbered by mortgage constitute a natural class, and legislation applying to all of them is general and not special. It follows, that the owners of all real estate encumbered by vendors' liens constitute another class just as distinct and quite as natural; the owners of real estate encumbered by mechanics' liens, another; the owners of real estate encumbered by street improvement liens, another; and the owners of real estate encumbered by judgment liens, still another. Therefore, no objection could
37 be taken to a further act of the legislature declaring that the owners of real estate liable for taxation in the State of Indiana, being indebted in any sum secured by a vendor's lien upon real estate, may have the amount of such indebtedness, not exceeding $1,000, deducted from the assessed valuation of the encumbered premises for the year, and that the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for that year. Then, other separate acts fixing deductions of $1,500 for indebtedness secured by mechanics' liens; $250 for indebtedness secured by street improvement liens, and $100 for indebtedness

secured by judgment liens, must also be unobjectionable. Could such legislation be defended? If not, by what argument can a classification, which selects as the objects of its favoritism one set of debtors, and excludes all others, notwithstanding their situation, is, in every legal aspect, undistinguishable from that of the favored individuals, be saved from the condemnation under the Constitution?

The very just and sensible remarks of Dixon, C. J., in Knowlton *v.* Supervisors of Rock county, 9 Wis. 421, are entirely pertinent here: "It is contended in argument," say the court, "that as those provisions fixed by one uniform rate without the recorded plats, and another within them, thus taking all the property without alike, and all within alike, they do not infringe the Constitution. In other words, that, for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and, having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule on the subject. It is believed that, if the legislature can by classification thus arbitrarily, and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also by the same means discriminate between lands used for one purpose, and those used for another, such as those used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by
38 the description, such as odd-numbered lots and blocks, and even-numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use, or description, or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions, and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession, or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature 'You shall not discriminate between individuals or corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against the other, as much as

you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn sanction of a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore can not adopt it."

I have been unable to find a single decision, State or Federal, in which an arbitrary classification such as that created by the act of March 4, 1899, has been sustained. Neither is any decision of this character referred to in the prevailing opinion. On the other hand, the reported cases condemning such rules of assessment and taxation are numerous and emphatic.

"This is a domain from which special and local legislation is utterly excluded whenever the legislative end can be effected by a general law." Van Riper *v.* Pearson, 40 N. J. L. 1, 9.

"Interdicted local and special laws are all those that rest on a false or deficient classification. * * *." Van Riper *v.* Parsons, 40 N. J. L. 1.

"There must be substantial distinction, having reference to
39 the subject matter of the proposed legislation between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restrictions of the legislation." State *v.* Hammar, 42 N. J. L. 435, 440.

"Such law must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them as a class." Randolph *v.* Wood, 49 N. J. L., 85.

"The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances." Lippman *v.* The People, 175 Ill., 101, 106.

"A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all." *Ex parte* Jentzsch, — Cal., —; 32 L. R. A., 664, 665.

"The conclusion is that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disability or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." Passadena *v.* Stimson, 91 Cal., 238.

"This classification, however, must be founded upon differences which are either defined by the Constitution, or natural, and which will suggest a reason which might rationally be held to justify the diversity in legislation." Darcy *v.* San Jose, 104 Cal., 642.

"While the classification was, in itself, arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made." *Ex parte* Jentzsch, — Cal., —; 32 L. R. A., 664, 665.

"Every one has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law, from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law." * * *

"The State, it is to be presumed, has no favors to bestow,
40 and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed." Cooley's Const. Lim. 393, 395. See also, Bank of the State, *v.* Cooper, 2 Yerg. 599; Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Grat. 31; Arnold *v.* Kelley, 5 W. Va. 446; Lewis *v.* Webb, 3 Greenl. 326; State *v.* Ellet, 47 O. St. 90, 21 Am. St. Rep. 772 and notes; State *v.* Hinman, 65 N. H. 103, 23 Am. St. Rep. 22 and notes; State *v.* Sheriff, 48 Minn. 236, 31 Am. St. Rep. 650; Hogg *v.* Mackay, 23 Ore. 339, 37 Am. St. Rep. 682; State *v.* Gardner, 58 Ohio St. 599, 65 Am. St. Rep. 785; Washington University *v.* Rouse, 8 Wal. 444.

The partial legislation of the act of March 4, 1899, is not sanctioned by anything said by this court in Florer, treas. *v.* Sheridan, adm., 137 Ind. 28. The statute which was held constitutional in that case permitted every debtor in the State to deduct the amount of his debts from the sum of his credits, the excess of the latter only being subject to assessment and taxation. Whatever may be said of that statute in other respects, the classification of the persons who might avail themselves of it was general, and in striking contrast with that of the act before us.

3. The privilege of the deductions authorized by the act of March 4, 1899, is confined to a particular class of debtors, and does not, upon the same terms, equally belong to all the citizens of the State. The privilege granted is that of a special mode of assessment which admits of a reduction of the valuation of real estate for the purposes of taxation. The terms upon which this privilege may be claimed are such that only a very limited class of debtors comes within them. The great body of the citizens of the State are by those terms excluded from the benefit of the privilege secured to the few. All who are not indebted at all, and who own land, must be assessed upon the full valuation of that land. All land owners who are indebted, but whose debts are not secured by mortgage on their lands, are excluded. All who are indebted, and whose lands are encumbered by liens, other than mortgage liens, are shut out. All citizens who own no real estate, but who hold mortgaged goods and chattels, are denied the privilege. The law which grants the privilege to the few, denies it to all others, as certainly as if it
41 declared, in so many words, that they should not enjoy it. And just in proportion as the terms on which such privileges are granted are made special and individual, the number of citizens who come within them is reduced. The vice of this statute, as has been pointed out elsewhere in this opinion, is in the classification.

It attempts to create a class within a class. The terms upon which the privilege is granted are too narrow. It is not sufficient that any citizen of the State may, possibly, at some time, fall within the description of the favored class. If this were so, classifications might be made which would not include a score of citizens in the State.

4. The practical effect of the act is to *exempt* from taxation property not used for municipal, educational, literary, scientific, religious, or charitable purposes, and for this reason it conflicts with § 1, article 10 of the constitution, and is void. The constitutional rule requires that *all* property, real and personal, shall be valued for taxation, except such only for the purposes above named, as may be especially exempted by law. It seems clear that if $700 may be deducted from the assessed valuation of each lot or tract of land in the State, which is encumbered by mortgage, that proportion of the value of each lot or tract is exempted from its due share of the common burden. Calling it a *deduction* does not make it any the less an exemption. If two lots are valued at $1,400 each, one being encumbered with a mortgage for $700, and the other not, and the owner of the first is required to pay taxes on a valuation of $700 only, and the owner of the second on $1,400, then the first lot, by reason of the encumbrance, is exempted from taxation to the extent of $700. Call it what you may, the owner of the first lot enjoys an immunity which is denied to his less fortunate neighbors. He is exempted from a burden, to which all others are subject. "The constitution absolutely prohibits the exemption of any property, except for municipal, educational, literary, scientific, religious, or charitable purposes, and as no part of plaintiff's property is included within any of these enumerated classes, any law which attempts to exempt it from taxation is void. And 'any law which indirectly produces such exemption must be equally void; that can not be accomplished indirectly which the organic law declares shall not be done directly;' Mr. Justice Field, in Huntington *v.* Worthen, 120 U. S. 97."

42 It is said in the brief of counsel for the appellant that "the deductions on account of mortgage indebtedness for the year 1900 aggregated over $35,000,000. The amount claimed for the year 1901 will approximate $40,000,000." For every dollar of valuation of real estate so withdrawn from assessment, the burden of taxation on what is left is increased by just so much. Every reduction of the aggregate assessment requires a proportionate increase in the rate of taxation. A law which works such stupendous and disastrous results to the great body of the taxpayers of the State should rest on solid and substantial foundations if it is to be sustained. Believing as I firmly do, that the act of March 4, 1899, is vicious and indefeasible in principle, and that its application is destructive of uniformity and equality in taxation, I think that it should be declared unconstitutional, and that the judgment of the Marion circuit court should be affirmed.

In addition to all that has been said, it may be added, that the act in question equally conflicts with the fourteenth amendment to

the Constitution of the United States, in that it denies to a large part of the citizens of this State, the protection it extends to a selected class.

Monks, J., concurs in dissenting opinion.

43 *Overruling of Petition for Rehearing.*

And afterwards to wit: on the 22nd day of May, 1902, the court being sufficiently advised in the premises overrules the petition for a rehearing heretofore filed by the appellee, with an opinion pronounced by Gillett, J., as follows:

Opinion on Motion for Rehearing.

Appellee's counsel have filed a petition for a rehearing in this cause, and we have given careful consideration to the views that find expression in their brief in support of such petition. After doing so, and upon a re-examination of, and further search for authorities, we adhere to the conclusion before announced, that the law is valid. The original opinion stated at length the views of a majority of the court, but the importance of the case is a sufficient reason for a further opinion.

It must not be forgotten that section one of article ten of the State constitution is not the source of the legislative power of taxation, for that section is only a curb upon the authority of the General Assembly. Can it be said that a law that authorizes a deduction of mortgage debts from the value of the tracts of real estate to which they respectively attach provides for an unequal assessment or that it is a regulation that prevents a just valuation of all property not authorized to be exempted by the constitution? It is true that the General Assembly has not power to fix a valuation upon real estate, but this act is based upon a recognition of the fact, that we have already shown upon the authorities, both Federal and State, that he who makes a mortgage upon his real estate does an act that amounts to a conditional alienation of his title, and it is, of course, unquestionable that he thereby parts with a substantial part of his land value. Counsel for appellee may assert that a mortgage is a mere lien, and for most purposes we so recognize it, but if it be the law, and it does not admit of question that it is, that the mortgage will be treated as a conveyance of title whenever necessary to protect the rights of the parties, the question arises whether the General Assembly cannot seize upon this fact to avoid double taxation? As pointed out in our former opinion, the Supreme Court of the United States has declared that a mortgage may be treated as a conveyance of the land *pro tanto*, so that, with statutory authority, a non-resident mortgagee may be compelled to pay a ratable part of the assessment upon the land, at the *situs* thereof. If it be asked, how do we justify the omission to place lands encumbered by vendor's liens,
44 mechanic's liens or judgment liens upon the same footing as lands subject to mortgage, we answer that such former de-

mands are mere liens, while in the case of a mortgage the mortgagor has by deed, in no insubstantial sense, parted with a part of his interest in the land. Is this not reason enough to justify the General Assembly in recognizing this as ground for distinction, when to do so would be, in its judgment, to accomplish justice? This court in the Florer case, held that debts could be deducted from credits, because the constitutional mandates as to equality in the assessment and as to a just valuation of all property not authorized to be exempted by the constitution had no reference to mere fictitious values, and this case stands upon the same general footing, but it finds stronger support in reason, in that there is a separation of values by defeasible deed. Within a year after the taking effect of the present State constitution the General Assembly passed an act concerning taxation which contained, in section twenty-three thereof, the following words: "Provided, that each tax payer may and is hereby authorized to deduct the amount of his indebtedness out of his solvent claims." Acts special session 1852, p. 44. The force of a construction of the constitution by a session of the General Assembly that had in its personnel a considerable number of the members of the constitutional convention is forcefully pointed out in City of Indianapolis *v.* Navin, 151 Ind., 139. The validity of such enactments as the one last mentioned has been a number of times assumed by this court before the decision in the Florer case. Matter *v.* Campbell, 71 Ind., 512; Wasson *v.* First Nat. Ban-, 107 Ind., 206; City of Indianapolis *v.* Vajen, 111 Ind., 240; Moore *v.* Hewitt, 147 Ind., 464. In the Florer case the question was directly in judgment, and we must overrule that decision if we depart from our previous ruling in this case, that the taxation law of 1899 is valid.

We will now call attention to a few authorities on the subject of mortgage deductions not cited in our previous opinion. The legislature of Oregon passed a law which provided for a taxation of real estate mortgages at the *situs* of the land, and authorized the deduction of the amount of such mortgages from the tracts of real estate to which they respectively attached. The constitution of Oregon upon the subject of taxation is in every material particular a precise counterpart of our constitutional provision on the subject, yet it was held in Crawford *v.*
45 Linn Co., 11 Ore. 482, upon a full consideration of the question, that the statute was valid. The statute referred to is the same one that the Supreme Court of the United States, in Savings and Loan Society *v.* Multnomah Co., 169 U. S. 421, held did not deny the equal protection of the laws. The case of State *v.* Runyon, 41 N. J. L. 98, is to a considerable extent in point. In the year 1876 the legislature of New Jersey enacted a statute that provided that mortgages upon real estate should not be taxed unless the mortgagor made a claim for a deduction on such account. In that event, even if the claim was allowed by the assessor, the mortgage was taxed at the *situs* of the land. In passing upon the validity of that law, the court, in the case cited, speaking by Depue, J., said: "Independent of constitutional restrictions and prohibitions,

the legislature is the sole judge of the propriety of taxation. It may select and define the sources from which the public revenue shall be derived, and prescribe the means by which taxes shall be laid, levied and collected. Perfect equality in taxation is a good that is unattainable, and will be so long as the instruments of government are imperfect. The framers of the constitutional amendments did not aim at the impossible. They contented themselves with the accomplishment of so much of good as was attainable under the single requirement that 'property shall be assessed for taxes under general laws and by uniform rules, according to its true value.' In other respects, the legislative power over taxation was left unimpaired. If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a two-fold *situs* for taxation, the legislature may select either as the place where the tax should be laid. Chattels considered under the legal classification of personalty, follow the person of the owner, and yet chattels may be so localized in use as to be taxable at the place where they are situate, as against the owner who resides elsewhere within the State. State *v.* Falkinburge, 3 Green 320. A mortgage possesses the same dual characteristics. The debt of which the bond is the representative is a chose in action which has no locality, and will follow the residence of the owner. The mortgage, as security for the debt, is a conveyance of a qualified interest in the mortgaged premises, and creates an estate in lands. * * * The legislature may, I think, select, as the *situs* of taxation of mortgages, either the political division where the owner resides, or that in which the mort-
46 gaged premises are situate." It must be admitted, of course, that the constitution of New Jersey does not require all property to be taxed, but the point in the case lies in the fact that it recognizes the right of the legislature, when it determines to tax lands, to permit mortgage values to be deducted therefrom, notwithstanding the requirement that property is to be assessed at its "true value."

We are not led to doubt whether the conclusion we have reached is right because under former legislation taxes have not been treated as debts which the owner was bound to pay. As before shown, they may be so treated, and we must regard the statute as a legislative recognition of the fact that substantially speaking the burden is upon the owner. Nor can we accept the view that the enactment in question is sporadic, and therefore to be treated as a legislative misfit in our system of taxation. In Lutz *v.* City of Crawfordsville, 109 Ind. 466, 468, the court said of the construction of statutes enacted at different times, but upon the same subject matter: "If the legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts, and uniform in its operation. It would violate all rules of logic, as well as settled principles of law, to dissect the system into parts and assign effect to each part irrespective of its effect upon the uniformity and consistency of the entire system. Statutes are to be construed as a part of a uniform system, and such a scheme

adopted as will give each part its appropriate place, and not destroy uniformity and harmony by cutting the system into disjointed and incongruous parts."

The authorities are against appellee on the subject of classification. In addition to the authorities cited in the principal opinion, we cite Edwards *v.* The People, 88 Ill. 340, 347, and People *v.* Barker, 155 N. Y. 330, 332. In the former case the supreme court of Illinois said: "It is also objected that the revenue law is unconstitutional, because the method of assessing is not uniform. The fact that certain credits and deductions may be allowed in the assessment of personal property, does not establish a want of uniformity. Where a law operates alike upon all persons and property like situated, it may be regarded as uniform. This, as we understand our revenue law, is its practical operation. Perfect equality of taxation
47 is a problem of difficult solution." In the New York case the court of appeals reached the same conclusion, but upon a somewhat different course of reasoning. The court said: "The right to have debts deducted from the value of taxable property is not an absolute one but in the nature of a favor. The State may grant or withhold it at pleasure. It was in the power of the State to tax all the property the relator had without providing for any deduction on account of debts. It cannot therefore be said that a law which permits the deductions as to certain debts and forbids it as to other debts, violates any constitutional provision."

On the subject of classification it is not difficult to accumulate extreme statements made by courts in the condemnation of statutes that so offend, but it materially conduces to a more intelligent understanding of the effect of such decisions if such statements are read in connection with the enactments they condemn. But if we may venture to attempt to extract the cardinal principle from the many discordant opinions upon the subject of classification, we may say that it will be found that what they condemn is a classification that is arbitrary, because it is not founded on differences recognized by the Constitution or naturally inhering in the subject-matter of the legislation to an extent that would at least suggest some reason why the law making power, acting in a presumed spirit of fairness, should have made the distinction. As stated before, we perceive in the statute under consideration a substantial reason for distinguishing between mortgages or defeasible sales and mere liens. And there is also a substantial reason for not permitting such deductions from personal property, since it is a fact, so well known as to be judicially recognized, that real estate bears more than its proportion of the burdens imposed by the State government.

The provision that not more than one half of the assessed value of the property shall be allowed as a deduction is not arbitrary, although some mortgagors may gain a greater benefit from the law than others. There is a basis in reason for such requirement, in that a wise public policy is conserved by an enactment that even if it releases a property owner from a part of the burden of taxation — still leaves him some portion of such burden, because his vote or influ-

ence is by that consideration likely to be cast on the side of holding public officers to due economy in the administration of public affairs.

In Cooley on Taxation, p. 170, it is said: "Even within the
48 class taxed, however, there may be rules of distinction; and these are perfectly admissible, provided they are general rules and are observed."

While the fact that the result of the upholding of this law may be to take millions of dollars worth of property from the State's assessment sheet has caused us to consider this case with great care, yet we cannot strike down the law for that reason. The question is political in its character, and, if the act is inimical to the interests of the State, the argument mentioned should be addressed to the General Assembly.

The petition for a rehearing is overruled.

All concur, except Dowling and Monks, J. J., who dissent.

49 *Certificate.*

It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things reversed at the cost of the appellee all of which is ordered to be certified to said court.

And it is further considered by the court, that the appellant recover of the appellee the sum of $36.60 for their costs and charges in this behalf expended.

THE STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said court, at the city of Indianapolis, this 23rd day of May, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

R. A. BROWN, *C. S. C.*

50 And afterwards, to-wit: on the 31st day of May, 1902, being the 24th judicial day of said May term of this court before the same hon. judge, the following proceedings were had herein, viz:

"Come the parties, and the defendant now files his return to the alternative writ of mandate herein in two paragraphs, and on motion, the plaintiff is ruled by the court to reply. Said return is in these words and figures, viz:

Return to Alternative Writ.

51 Part 1. Return to alternative writ.

STATE OF INDIANA, *Marion County,* } *ss:*

In the Circuit Court, May Term, 1902.

STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis
vs.
HARRY B. SMITH, Auditor of Marion County. } No. 10986.

Return to Alternative Writ of Mandate.

Par. I. The defendant, Harry B. Smith, auditor of Marion county, in the State of Indiana, for return to the alternative writ herein, alleges that the complaint and alternative writ herein asks from the court an order to compel this defendant as auditor, to allow to the relator the exemptions therein claimed and set out, under and by virtue of the provisions of an act of the General Assembly of the State of Indiana, entitled: "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," which became the law, without the governor's signature, March 4, 1899, which said act is in the words and figures following, to-wit:

52 SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

SEC. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of such mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

SEC. 4. Any person who shall willfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

SEC. 5. Whereas, an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

But this defendant says that said act is wholly unconstitutional and void, in the following particulars, to-wit:—

1. That the said act is in violation of section 23, article 1 of the bill of rights of the constitution of the State of Indiana, which provides that: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" in that the said act does grant privileges and immunities to citizens, and classes of citizens, which, upon the same terms, are not granted to all citizens.

2. That the said act is in violation of section 22, article 4, of the constitution of the State of Indiana, which prohibits the General Assembly of the State of Indiana from passing local or special laws,

* * *, for the assessment and collection of taxes for State,

53 county, township or road purposes, in that the said law is a special law for the collection of taxes for State, county and township purposes.

3. That the said act is in violation of section 23, article 4, of the constitution of the State of Indiana, which prohibits special laws in all cases where a general law can be made applicable, and provides that "all laws shall be general, and of uniform operation throughout the State," in that the said act is not a general law, and a law of uniform operation throughout the State, where a general law could be made applicable, but, on the contrary, is special and discriminating, and creates classes, and relieves and exempts individuals unequally, and without ratio, from taxation.

4. That the said act is in violation of section 1, article 10, of the constitution of the State of Indiana, which provides that "the General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for the taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law;" in that the said act, by its provisions, exempts from taxation property not used or held for municipal,

educational, literary, scientific, religious or charitable purposes; and in that said act provides for an assessment, taxation and valuation of property which is not uniform and equal, and which is without ratio; and in that said act does not prescribe such regulations as to secure a just valuation for taxation for all property, both real and personal, as provided by the said constitutional provision.

Wherefore the defendant says that said writ should not issue, and that the relator is not entitled to the order and relief sought, and prays judgment for costs.

54 *Part 2. Return to Alternative Writ.*

Par. II. The defendant, Harry B. Smith, auditor of Marion county, in the State of Indiana, for a second and further paragraph of return to the alternative writ herein, alleges that the complaint and alternative writ herein asks from the court an order to compel this defendant, as auditor, to allow to the relator the exemptions therein claimed and set out, under and by virtue of the provisions of an act of the General Assembly of the State of Indiana, entitled: "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," which became the law, without the governor's signature, March 4, 1899, which said act is in the words and figures following, to-wit:—

55 SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

SEC. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall

immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of such mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

SEC. 4. Any person who shall willfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

SEC. 5. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

But this defendant says that said act is wholly unconstitutional and void, and in violation of the fourteenth amendment of the Constitution of the United States, which provides that

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens *on* the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;"

in this, that said act and law does abridge the privileges and immunities of citizens, and discriminates between citizens of the United States, and of the State of Indiana, by granting privileges, immunities and exemptions to one person, or class of persons, not enjoyed by all persons equally and alike; and deprives certain ones of the citizens and persons of said State of their property without due process of law; and denies to certain persons and citizens of the
56 United States, and of the State of Indiana, the equal protection of the law by compelling the said persons to pay and bear an inequitable, unjust and unequal part and portion of the taxes levied for State, county, township and road purposes; all in violation of the provisions of the said fourteenth amendment to the Constitution of the United States in such case made and provided, in this:

That the State of Indiana has large educational and school funds, amounting in gross to about fifteen millions of dollars, ($15,000,000.00); that about three millions of dollars ($3,000,000.00) of said funds are under the custody and control of this defendant, as auditor of Marion county, State of Indiana. That said funds are required, by law, to be loaned and invested by this defendant and other county auditors of the State of Indiana, and the interest only thereon is used in maintaining the common schools of the said State, and the principal is required to be ever kept intact and maintained unimpaired; and the loans from said funds are required by law to

be secured by mortgage upon real estate, not exceeding two thousand dollars ($2,000.00) in any one loan.

That such funds are not taxable, by law, being educational funds belonging to the State to be loaned, as aforesaid, and no provision is made by said law exempting loans made from said funds from the operation of said act of March 4, 1899, aforesaid.

That said law, while it deducts and excepts the mortgage indebtedness of the owner from taxation, has no provision therein requiring the amount exempted to be taxed or charged to the lists of any other person.

That large sums of money are loaned in Indiana, and in Marion county of said State, by corporations, insurance companies and others, who are non-residents of said State, and whose funds are not taxable therein, and said law has no provision excepting from the operation thereof mortgages held by non-residents, and not taxable in the State of Indiana.

That the State of Indiana, and Marion county in said State, has a great number of institutions and association-, such as cemetery associations, literary institutions, colleges, and other institutions of literary, charitable, municipal, educational and religious character, all of which have, hold, own and loan their funds, and secure the same by mortgage upon real estate, all of which institutions, and
57 their funds, are exempt from taxation by the constitution of said State, and against which said institutions the deductions made from the lists of other persons cannot be taxed, by reason of their right of exemption from taxation, and said act has no provision excepting therefrom the mortgages belonging to such institutions and persons.

That by reason of the facts stated, enormous amounts of property escape from and are exempted from taxation by the operation of said law. That thereby, all persons owning real estate unincumbered by mortgage, and the owners of all other kinds of taxable property, are compelled and required to submit to and pay a larger proportion and amount of taxes, to make up the deficit and the amount necessary to meet the public obligations, than is their just, equal and proportionate share, by the operation and provisions of said act.

That section 1, article 10, of the constitution of the State of Indiana is as follows:

"Assessment and taxation.—1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."

That section 1 of the above quoted act of March 4, 1899, provides, as hereinbefore set out, that there shall be "deducted from the assessed valuation of mortgage premises for that year," the amount of the exemption and deduction allowed and provided for by said

law, and it is provided, by the terms of said section of said act, that "the amount of such valuation remaining after deduction shall have been made, shall form the basis for assessment and taxation for said real estate for said year," thereby making two bases for the taxation of real estate, differing in character and ratio, contrary to the said constitutional provision of section 1, article 10, of the constitution of the State of Indiana, hereinbefore set forth.

Wherefore defendant says said writ should not issue; that the relator is not entitled to the order and relief sought, and prays judgment for costs.

HAWKINS AND SMITH,
Att'ys for Def't.

58 And afterwards, to-wit: on the 5th day of June, 1902, being the 4th judicial day of the June term aforesaid of this court, the following proceeding was had herein, viz:

"Come the parties and the plaintiff now files a demurrer to the return of the defendant to the alternative writ of mandate herein in these words, viz:"

Demurrer to Return.

"STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Circuit Court, May Term, 1902.

STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis	No. 10986. Demurrer to Return to Alternative Writ.
v.	
HARRY B. SMITH, Auditor of Marion County.	

Come now the plaintiffs in the above entitled cause, and demurs separately and severally to each of the first and second paragraphs of the return to the alternative writ of mandate of said defendant Harry B. Smith, auditor of Marion county, for the reason that neither of them state facts sufficient to constitute a sufficient return or answer to the alternative writ of mandate.

WM. B. SCHWARTZ,
Att'y for Plaintiff."

And afterwards, to-wit: on the 6th day of June, 1902, being the 5th judicial day of the said June term aforesaid, of this court,
59 before the same hon. judge, the following proceedings were had herein, viz:

Demurrer Sustained.

"And now on this 6th day of June, 1902, comes the plaintiff by William B. Schwartz, its attorney, and comes the defendant by Hawkins and Smith his attorneys, and the court sustains the demurrer of the plaintiff to each paragraph of the return of the defendant herein, to which ruling the defendant at the time excepted.

And now the defendant is ruled to make further return, and being so ordered, elects to stand by his return as made, and declines to make further return, or answer further, and now, thereupon, the court finds for the relators, and that they are entitled to the relief prayed in their complaint.

Judgment.

It is therefore ordered, adjudged and decreed by the court that a peremptory writ of mandate issue out of and under the hand of this court, to the defendant Harry B. Smith, auditor of Marion county, Indiana, commanding him to forthwith allow the exemption prayed for by the relators in the complaint herein, and to deduct from the assessed valuation of the real estate described in the complaint, the amount of the mortgage thereon shown, to-wit: five hundred dollars, ($500.00), and to make the amount of such valuation of said real estate remaining after said deduction shall have been made, form the basis for assessment and taxation for said real estate in the complaint described, for the year 1900.

And the relators herein shall have and recover from the defendant their costs, taxed at — dollars ($—), to all of which rulings, order and judgment of the court, the defendant at the time excepted.

Appeal Prayed.

And the defendant now prays an appeal to the supreme court of Indiana, which is granted upon the filing by the defendant of his appeal bond herein in the sum of two hundred dollars
60 ($200.00) within ninety (90) days to the approval of the court.

Bond Filed.

And now comes the defendant Harry B. Smith, auditor of Marion county, Indiana, and files his appeal bond herein, in the sum of two hundred dollars ($200.00), which bond is now approved by the court and is in these words and figures, viz:

61 *Bond.*

Appeal bond, supreme court.

Know all men by these presents, that we Harry B. Smith, auditor of Marion county, as principal and Fred K. Shephard, as surety are held and firmly bound unto Martha Lewis and Benjamin Lewis as relators, in the penal sum of two hundred dollars, to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 6th day of June, 1902.

The condition of the above obligation is such, that whereas, heretofore, to wit: on the 6th day of June, 1902, the said Martha Lewis and Benjamin Lewis as relators in the Marion circuit court, recovered a judgment against the said Harry B. Smith, auditor of Marion county for a peremptory writ of mandate for the sum of — dollars, in damages and costs of suit, etc.; from which said judgment of said Marion circuit court, the said Harry B. Smith, auditor of Marion county prayed appeal to the supreme court of Indiana.

Now if the said Harry B. Smith, auditor of Marion Co. shall well and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against him, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

HARRY B. SMITH. [SEAL.]
FRED K. SHEPARD. [SEAL.]
—— ——. [SEAL.]

Approved June 6th, 1902.

HENRY CLAY ALLEN, *Judge.*

[Endorsed:] No. 10986 State of Indiana *ex rel.* Martha J. Lewis *vs.* Harry B. Smith Appeal bond Amount, $200.00 Filed June 6 1902 Geo. B. Elliott, clerk. —— —— attorney.

62 *Clerk's Certificate.*

STATE OF INDIANA, } *ss:*
Marion County, }

I, George B. Elliott, clerk of the circuit court within and for the county aforesaid, do hereby certify that the foregoing transcript contains full, true and complete copies of all the entries of proceedings had and of all papers filed in said court in cause numbered 10,986, as appear from the records and files thereof, now in my custody.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Marion circuit court, at my office in the [SEAL.] city of Indianapolis, this 17th day of June, 1902.

GEO. B. ELLIOTT, *Clerk.*

63 *Assignment of Errors.*

In the Supreme Court of Indiana.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
v.
STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis, Appellee.

Filed Jun- 18, 1902. R. A. Brown, Clerk.

The appellant, Harry B. Smith, auditor of Marion county, Indiana, avers that there is manifest error in the proceedings and judgment in said cause in this:

First. The court erred in overruling the demurrer of the appellant to the complaint, affidavit and alternative writ constituting the complaint herein.

Second. The court erred in sustaining the demurrer of the appellee to the first paragraph of appellant's return and answer to the alternative writ and complaint herein.

Third. The court erred in sustaining the demurrer of appellee to the second paragraph of appellant's return and answer to the alternative writ and complaint herein.

Wherefore the appellant prays that the judgment herein be reversed.

HAWKINS & SMITH,
Attorneys for Appellant.

64 *Joinder in Error.*

The State of Indiana on the relation of Martha Lewis and Benjamin Lewis, appellee herein, says that there is no error in the proceedings or judgment in the above entitled cause.

WILLIAM L. TAYLOR,
Attorney Gen'l of Indiana, and
WM. B. SCHWARTZ,
Attorney- for Appellee.

Filed Jun- 18 1902
R. A. BROWN, *Clerk.*

65 And afterwards, to-wit: on the 18th day of June, 1902, the same being the 21st judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by their counsel, and file their joint petition to use the same briefs filed in No. 19,752, heretofore decided in this court, which petition is in the words and figures following: (Here insert.)

And on the same day the following further pleas and proceedings were had in said court, in said cause, to-wit:

Come now the parties, by their counsel, and file their joint motion to advance, which motion is in the words and figures following: (Here insert.)

And on the same day the following further pleas and proceedings were had in said court, in said cause:

Come now the parties, by their counsel, and the court being sufficiently advised in the premises, grants said petition to use the same briefs filed in No. 19,752.

And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his brief (8) in the words and figures following: (Here insert.)

66 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellee, by counsel, and files its brief (8) in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 19th day of June, 1902, the same being the 22d judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, orders that said cause be advanced and submitted for decision.

And on the same day the following further pleas and proceedings were had in said court in said cause:

Comes now the appellee, by counsel, and files its petition for certiorari, together with a waiver of notice; which petition and waiver of notice are in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 20th day of June, 1902, the same being the 23rd judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, overrules appellee's motion for certiorari, heretofore filed.

67 And afterwards, to-wit: on the 27th day of June, 1902, the same being the 29th judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, now affirms the decision and judgment of the court below in the above entitled cause, with an opinion pronounced by Gillett, J., in the words and figures following:

This is the second appeal of this cause. Upon the first appeal, decided at the November term, 1901, under the title, State, *ex rel.* Lewis, *et al. v.* Smith, auditor, the essential questions on this appeal were determined against the appellant herein. On the authority of the decision rendered in said former appeal, the judgment of the court below, from which this appeal is prosecuted, is affirmed.

Dowling, C. J. and Monks, J., dissent.

68 And afterwards, to-wit: on the 30th day of June, 1902, being the 31st judicial day of the May term 1902, of said supreme court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the clerk of the supreme court, his petition for the allowance of a writ of error, said petition being hereto next below attached, and being as follows:

69 STATE OF INDIANA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Appellees. } No. 19901.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the supreme court of the State of Indiana, in rendering judgment against him, in the above entitled cause, the appellant, Harry B. Smith, auditor of Marion county, Indiana, hereby prays a writ of error from the said decision and judgment of the supreme court of the State of Indiana to the Supreme Court of the United States.

Assignment of errors is filed herewith.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Att'ys for Appellant.

STATE OF INDIANA, } ss:
In the Supreme Court, }

Let the writ of error issue upon the execution of a bond by Harry B. Smith, auditor of Marion county, Indiana, appellant, to the State of Indiana on the relation of Martha Lewis and Benjamin Lewis, in the sum of five hundred dollars, ($500.00); said bond when approved to act as a supersedeas.

Dated June 30, 1902.

ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

70 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files a writ of error from the Supreme Court of the United States, to the said supreme court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

71 UNITED STATES OF AMERICA:

The President of the United States of America to the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court of Indiana, before you, at the June sitting of the May term, 1902, thereof, between Harry B. Smith, auditor of Marion county, Indiana, appellant, *vs.* State of Indiana on the relation of Martha Lewis and Benjamin Lewis, a manifest error has happened, to the great damage of the said appellant, Harry B. Smith, auditor of Marion county, Indiana, as by his complaint appears; we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this June 30, 1902.

Done in the city of Indianapolis, with the seal of the circuit court of the United States for the district of Indiana attached.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk Circuit Court United States, District of Indiana.

Allowed.
ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

72 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his bond on appeal to the Supreme Court of the United States, in the penal sum of five

hundred ($500) dollars, which bond is now taken and approved, being hereto next below attached, and being as follows:

73 STATE OF INDIANA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Plaintiff in Error,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Defendant in Error.
} No. 19901. Bond.

Know all men by these presents, that we, Harry B. Smith, auditor of Marion county, Indiana, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Indiana, for the benefit of Martha Lewis and Benjamin Lewis, relators in the above entitled cause, defendant in error, in the sum of five hundred dollars, to be paid to the said defendant in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June, 1902.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of the State of Indiana:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

HARRY B. SMITH, [SEAL.]
Auditor Marion Co., Ind.

[Seal American Surety Company, New York.]

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By HORACE E. SMITH, *Resident Vice President.*

Attest: ERNEST V. CLARK, *Resident Assistant Secretary.*

The above bond is approved.
ALEXANDER DOWLING,
Chief Justice of the State of Indiana.

74 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his citation on said writ of error, duly signed by Hon. Alexander Dowling, chief justice of this court, and proof of service of the citation on the attorney for the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

75 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Indiana on the relation of Martha Lewis and Benjamin Lewis, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Indiana, wherein Harry B. Smith, auditor of Marion county, Indiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Indiana, this 30 day of June, 1902.

ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

Attest:
ROBERT A. BROWN,
Clerk of the Supreme Court of the State of Indiana.

INDIANAPOLIS, INDIANA, *June* 30, 1902.

I, William L. Taylor, attorney-general of the State of Indiana, and attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WILLIAM L. TAYLOR,
Attorney-General and Attorney for the State of Indiana and the Relators herein.

76 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files an assignment of errors in the Supreme Court of the United States, on a writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

77 UNITED STATES OF AMERICA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Appellees. } No. 19901.

Assignment of Errors.

Comes now Harry B. Smith, auditor of Marion county, Indiana, appellant in the above entitled cause, and files herewith his petition for a writ of error, and shows that there is manifest error in the records, proceedings and judgment of the court in the above entitled cause, and, for the purpose of having the same reviewed by the Supreme Court of the United States, makes the following assignment:

The supreme court of the State of Indiana erred in holding and deciding that the act of the General Assembly of the State of Indiana, passed March 4, 1899, which became a law without the signature of the governor, entitled, "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," and particularly, sections one, two and three thereof, were constitutional and valid. The validity of said act, and said sections, was denied and drawn in question by the appellant herein, on the ground of their being repugnant to the fourteenth amendment to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The supreme court of the State of Indiana erred in holding and deciding:—

First. That the demurrer to the alternative writ, which was sustained by the circuit court of Marion county, Indiana, was
78 properly and correctly sustained, whereby it was decided that the said act of March 4, 1899, was constitutional and valid, and did not abridge the rights, privileges and immunities of citizens, and particularly of this appellant, and did not deprive the appellant of the equal protection of the laws, all as guaranteed by the fourteenth amendment to the Federal Constitution.

Second. That the demurrer to the second paragraph of return of the appellant herein to the alternative writ, which was sustained by the circuit court of Marion county, Indiana, was properly and correctly sustained, whereby it was decided that the said act of March 4, 1899, was constitutional and valid, and did not abridge the rights, privileges and immunities of citizens, and particularly of this appellant, and did not deprive the appellant of the equal protection of the

laws, all as guaranteed by the fourteenth amendment to the Federal Constitution.

For which errors the appellant, Harry B. Smith, auditor of Marion county, Indiana, prays that the judgment of the said supreme court of the State of Indiana, dated June 30, 1902, be reversed, and a judgment entered for the appellant, Harry B. Smith, auditor for Marion county, Indiana, for costs.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Att'ys for Appellant, Harry B. Smith, Auditor of Marion County, Indiana.

79 STATE OF INDIANA:

In the Supreme Court.

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the supreme court of Indiana, in the above entitled cause; also the original petition for the allowance of a writ of error, and the original writ of error from the Supreme Court of the United States to the supreme court of Indiana, with the allowance thereof, in this cause; the original citation to the defendant in error and proof of service thereof; the original assignment of errors in the Supreme Court of the United States on said writ of error, and a copy of the original bond and its approval.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, said original writ of error, original citation, original assignment of errors, and copy of the original bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at the city of Indianapolis, this 30th day of June, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBERT A. BROWN,
Clerk Supreme Court of Indiana.

80 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Supreme Court of Indiana, }

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city of Indianapolis, Indiana, this 30 day of June, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBERT A. BROWN,
Clerk of the Supreme Court of the State of Indiana.

Plaintiff's costs, —
Defendant's costs, —
Costs of transcript, —

____ ____,
Clerk of the Supreme Court of the State of Indiana.

Endorsed on cover: File No. 18,600. Indiana supreme court. Term No. 81. Harry B. Smith, auditor of Marion county, Indiana, plaintiff in error, vs. The State of Indiana on the relation of Martha Lewis and Benjamin Lewis. Filed July 5th, 1902.